UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM ORDER

MARVIN E. ASPEN, District Judge:

A.

For the reasons that follow, Jewel's motion to reconsider the Court's June 26, 1986 opinion is denied.

With respect to the "duty of fair representation" issue, *see* June 26 opinion at 6-16, Jewel says little it did not say earlier, and we adhere to our analysis in the opinion. Jewel continues to give short shrift to the nature and depth of the conflict of interest in this case. We agree with Jewel's uncontroversial premise that unions often balance conflicts between groups of employees, and that under typical labor law cases they still have a duty to represent all groups fairly. But the conflict in this case is special and unusual, as it involves *former* employees with a

discrete conflict of interest with current employees. As the *Allied Chemical* case teaches, 404 U.S. at 172-75, 92 S.Ct. at 394-96, where conflicts between current and former employees are sharp, and where a powerful majority group with many interests will likely dominate a discrete minority with limited interest, the former employees can no longer be considered appropriate members of the bargaining unit, subject to the union's representation. We continue to believe that *Allied Chemical* is closely analogous to this case, and that it supports our holding that the Union owed no duty to plaintiffs.

Also, despite Jewel's arguments to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system. We disagree with Jewel that our opinion will give an incentive to employees involved in a labor dispute to quit and seek an individual remedy rather than stay on the job, bound to the Union's representations. More likely than this far-fetched scenario is the other side of the coin: a holding contrary to ours could encourage unscrupulous employers to cut wages and benefits unilaterally and drag out a battle with a union, hoping that, as employees leave as part of normal attrition during the long delay, it could play upon the conflict between former employees and union members and save money by reaching a settlement freezing out those employees who left. In any event, putting aside speculation about the effect of our holding on future cases, we think that the failure of the parties and the Court to find reported cases like this one demonstrates that this type of case will not be common, and that the impact of our holding is limited to the unusual fact pattern of this case.

Turning to the statute of limitations issue, we find that Jewel offers nothing significant that it did not argue earlier. We stand by our opinion and deny that part of the motion to reconsider as well.

B.

We grant Jewel's motion to certify an interlocutory appeal and to stay proceedings in this Court pending the appeal. Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal if when it enters an order and believes that the order

(1) involves a controlling question of law,

(2) as to which there is substantial ground for difference of opinion, and

(3) that an immediate appeal may materially advance the ultimate termination of the litigation.[1]

The first two criteria are easily met in this case. Our June 26 opinion and order involved two such controlling questions, one involving the duty of fair representation and the second the proper statute of limitations. At minimum a question is controlling when it would constitute reversible error on appeal if wrongly decided. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 855 (1974); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure*, § 3930 (1977) at 159. Both questions plainly meet this standard; they are pivotal. Moreover, there is substantial ground for difference of opinion with respect to both questions. As our opinion described, there was no good precedent for either issue. We had an unusual fact situation falling into a gap in both doctrines analyzed, and the correct answer is not obvious.

We also find that the third criterion for interlocutory review is met. Limitations issues are particularly appropriate under this element if the other elements are met, since decision of the issue might dispose of the suit, or at least drastically curtail its scope. *See, e.g., Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 291 n.2 (8th Cir. 1975); 16 Wright & Miller, § 3931 at 181. Similarly, immediate appeal of the duty of fair repres-

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[1] That section reads in full:

> (b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

entation issue may also bring a speedier and more efficient end to this suit. If we are reversed, we will avoid going to trial on the merits without the Union; the shape and direction of the suite differs significantly depending on the Union's presence in the suit. As we noted in our June 26 opinion at 5, plaintiffs' two theories of recoveries are mutually exclusive. It will ultimately. save cost and time to resolve finally this watershed issue as early as possible.

For all the above reasons, certification of an interlocutory appeal is warranted here. We also believe a stay of lower court proceedings pending appeal is proper here. The next status hearing is hereby set for January 9, 1987, for a report on the progress of the appeal. The parties shall also report promptly any decisions or significant order of the Court of Appeals in this case. It is so ordered.

C.

The motions of Jewel and the Union to consolidate this case with No. 85 C 10362 as related under Local Rule 2.31 are granted. We find that the criteria of that Rule are satisfied.

D.

In conclusion, Jewel's motion to reconsider is denied. The motions to consolidate this case with No. 85 C 10362 are granted, as well as Jewel's motion to certify an interlocutory appeal under 28 U.S.C. §1292(b). It is so ordered.

/s/ MARVIN E. ASPEN

MARVIN E. ASPEN
United States District Judge

DATED 8/13/86

APPENDIX J

STATUTES INVOLVED

Federal Statutes:

29 U.S.C. § 159(a).

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 160(b).

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 173(d).

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 185(a).

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment

to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

APPENDIX K

ARTICLE IX
NO STRIKES; NO LOCKOUTS; GRIEVANCES & ARBITRATION

Section 9.1 No Strikes; No Lockouts

The Union and the Employer agree on the need for the continuance of their service to the public without interruption. Both recognize this objective as necessary to the security of the Employer and its people. Both, therefore, specifically pledge themselves to help assure that security by using the procedures agreed upon between them for the adjustment of disputes and grievances in all cases where there is any difference of opinion concerning the rights of either under this Contract or the interpretation or application of any provision of it. Therefore, during the term of this Agreement there shall be no strikes, stoppages, diminution or suspension of work of any kind whatsoever on the part of the Union or its membership; nor shall there be any lockout on the part of the Employer.

Section 9.2 Grievances

(A) Grievance Defined

A grievance is hereby defined as any dispute involving the interpretation or application of the provisions of the Contract.

(B) Procedure

A grievance may be initiated by any individual employee, by the Union or by the Employer. Once initiated, the following steps shall be taken to settle such grievance:

Step 1: By conference between the aggrieved employee, the shop steward, or both, and the Store Manager or Resident.

Step 2: By conference between a Union representative and the Store Manager and/or the Divisional Manager or other representative designated by the Divisional Manager.

Step 3: By conference between a Union representative and the Grocery Operating Manager or such other official as the Employer may designate to represent it in such conference.

Any grievance initiated or carried to Step 3 shall be reduced to writing. Grievances involving only one store shall be introduced only at Steps 1 or 2, while grievances involving more than one store may be introduced at any step. All grievances shall be investigated and answered promptly.

(C) Time Limits on Grievances

Any grievance involving a claim of improper discharge or other discipline must be presented within fifteen (15) days after discharge or disciplinary action. All other grievances excluding discharge or disciplinary action must be made within thirty (30) calendar days after the cause giving rise to the grievance becomes evident. Wage claims involving the proper application of wage rates shall not be valid and collectible for a period earlier than 180 calendar days prior to the date of filing the claims. All other wage claims as to the number of hours worked shall not be valid and collectible for a period earlier than ninety (90) days prior to the date of filing the claim.

Section 9.3 Arbitration

(A) Either the Union or the Employer may, within thirty (30) calendar days after failure to adjust the grievance in accordance with the grievance procedure, serve upon the other party a written demand for arbitration stating the issue to be arbitrated. The parties shall endeavor to select an impartial arbitrator. However, if the parties fail to agree upon an arbitrator who is willing and able to serve within fifteen (15) calendar days after service of the demand for arbitration, either party may, within seven (7) calendar days thereafter, request the American Arbitration Association to submit a list of not less than five (5) disinterested persons who are qualified and willing to act

as impartial arbitrators. Upon receipt of this list, an authorized representative of the Union and of the Employer shall flip a coin to determine who shall have first choice to strike a name. The party winning the toss shall then strike a name from the panel. Thereafter, the parties shall alternately strike one name each until only one name remains. The person whose name remains shall be the selected arbitrator.

(B) The arbitrator shall commence hearings as quickly as possible after his selection and shall render his award in writing together with his written findings and conclusions as quickly as reasonably possible after the hearing. The award shall be final and binding upon the parties to this Agreement and upon the complaining employee or employees, if any.

The arbitrator shall have no power to determine arbitrability nor to add or substract from, modify, or amend any provision of this Agreement, nor to substitute his discretion for the discretion of the Union or the Employer, change existing wage rates, or arbitrate proposals for the amendment or renewal of this Agreement.

The arbitrator's fees and expenses, the cost of any hearing room and the cost of a shorthand reporter and of the original transcript shall be borne equally by the parties. All other cost and expenses shall be borne by the party incurring them.

(C) For the purpose of entertaining a written request from either of the parties for rehearing to correct any material error of omission or commission, ambiguity, or question of application allegedly evident in the opinion or award the arbitrator shall, for a period of seven (7) calendar days next following the date of his award, retain jurisdiction of the matter submitted to arbitration by the parties hereto, and until the expiration of the period of time stated in this provision for rehearing the award shall not

be deemed to have been issued. If, however, no request for rehearing is duly filed within this seven (7) day period, this award shall be deemed to be issued effective as of its date. A written request for rehearing shall detail the specific grounds relied upon for alleging a material error, or ambiguity, and a copy thereof shall be mailed by certified mail to the other party or parties. If the written request is postmarked no later than the seventh (7th) day next following the date this award, it shall extend the jurisdiction of the arbitrator for a period of seven (7) days next following the date of the written request. Within those seven days the arbitrator, having reexamined the matter, shall in writing either reject the request for a rehearing or set a date for the requested rehearing. If the request for rehearing be denied, this award shall thereupon be deemed to be issued effective that date and the jurisdiction of the arbitrator shall accordingly cease. If the request for rehearing be granted, the jurisdiction of the arbitrator shall continue until issuance of a final amended award incorporating or rejecting the substance of the allegations contained in the request.

(D) The participation by the parties in an arbitration proceeding under this Agreement shall not be deemed a waiver of or prejudicial to the right of either party to contest the arbitrability of the grievance or the jurisdiction and authority of the arbitrator in proceedings to set aside the award or in other appropriate proceedings in any State or Federal court of competent jurisdiction; provided such judicial proceedings are instituted within thirty (30) days of the date of the arbitrator's award.

APPENDIX L

United Food & Commercial Workers
International Union, AFL-CIO & CLC

February 17, 1984

Mr. P. Neill Petronella
Group Vice President
External Affairs and General Counsel
Jewel Food Stores
1955 West North Avenue
Melrose Park, Illinois 60160

RE: UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 881 - JEWEL FOOD STORES - CHICAGO METROPOLITAN AREA CONTRACT

Dear Mr. Petronella:

On February 16, 1984 we responded to your letter of the same date and stated in part as follows:

> "We are prepared to submit to immediate arbitration the issue of whether you are legally entitled to implement such changes."

Implementing our position in this regard, the Union herewith files a grievance pursuant to Section 9.2 of the contract protesting your announced cut of contract wages, vacations and personal holidays, effective February 26, 1984.

Needless to say there is a serious dispute between us as to whether the Company has the right to unilaterally make mid-term contract modifications. Under the contract this dispute can be resolved through arbitration. It is in the best interest of all concerned that this be done as quickly as possible and hopefully before the first payday following February 26, 1984. We ask that the steps of the grievance procedure, all of which are irrelevant given the nature of the dispute, be waived and that the parties immediately proceed to select an arbitrator in accordance with Section 9.3 of the contract.

Because of the urgency of this matter we ask that you respond to this letter as promptly as possible.

Very truly yours,

Ronald E. Powell
President

REP:sh
cc James Henson, President,
Jewel Food Stores,
Marshall Collins, Executive Vice president,
Jewel Food Stores

RONALD E. POWELL
President

THOMAS J. WALSH
Secretary/Treasurer

LOCAL 881
9865 W. Roosevelt Road
Westchester, IL 60153
(312) 681-1000